

**BEFORE THE
POSTAL REVIEW COMMISSION
WASHINGTON D. C., 20268-0001**

**Complaint of the Center
For Art and Mindfulness, Inc.
And Norton Hazel**

Docket No. C2015-1

**REPLY OF CENTER FOR ART AND MINDFULNESS, INC. AND NORTON
HAZEL IN OPPOSITION TO THE UNITED STATES POSTAL SERVICE'S
MOTION TO DISMISS THEIR COMPLAINT.**

**I. PROCEDURAL POSTURE OF COMPLAINT AND PRIOR
ACTIONS.**

The Center for Art and Mindfulness, Inc. (“Art Center”) and Norton Hazel (“Hazel”) filed a five count Complaint against the United States Post Office, Patrick Donahoe, the Postmaster General, (“Donahoe”) and Louis R. Cappelli Family Limited Partnership III (“Cappelli”) regarding the sale process and precipitous closing of the Stamford, Connecticut downtown historic post office (the “Historic Stamford Post Office”) on September 20, 2013.¹ The activities

¹ The USPS posted notices on the Historic Stamford Post Office on September 18, 2013 that it would close on September 20, 2013 without any written notice to its customers of the closing or public hearing as required under the provisions of 39 U.S.C. § 404(d) of the postal statutes when a post office is closed or consolidated as opposed to a relocation of the post office. That notice stated that the post office would close despite no replacement post office to relocate to. The notice posted on the building informed the postal post office box and other customers of

surrounding the tainted sale process for the proposed sale of and the closing of the Historic Stamford Post Office took place between March, 2012 and December, 2014. The Historic Stamford Post Office is an historic post office listed on the National Registry of Historic Places.²

Previous to the filing of this Postal Review Commission (“PRC”) Complaint on December 29, 2014, the Art Center and the National Post Office Collaborate, of Berkeley, California (“Plaintiffs”) filed a multi- count lawsuit in the Federal District Court of Connecticut against the USPS and Donahoe (“Defendants”).³ In that case, the Plaintiffs’ obtained a temporary and permanent injunction against the Defendants, USPS and Donahoe, on September 26, 2014 and October 27, 2014 respectively, prohibiting the sale of the Historic Stamford Post Office until the Defendants’ complied with certain federal laws applicable to them.⁴ The Defendants’ filed a Motion to Dismiss regarding two counts of the Federal Court complaint (Count III, Public Trust and Count IV discrimination under 39 U. S C. § 403(c)) and prepared an Environmental Assessment (“EA”) as required by the

the Historic Stamford Post Office were directed to go to other existing postal facilities to collect their post office box mail or obtain the postal services they were used to obtaining in downtown Stamford.

The Complainants have filed an Amended Complaint filed only against the United States Postal Service, and not Mr. Donahoe or the Louis R. Cappelli Family Limited Partnership as part of this filing.

² The Historic Stamford Post Office was listed on the National Registry of Historic Places in 1985 because of its architectural style (Italianate Renaissance style building), historical significance and interior aspects as described in the Federal Court case permanent injunction Order dated October 28, 2014. See, Order of Federal District Court Issuing Preliminary Injunction. Document No. 52 in *National Post Office Collaborate et al. v. United States Postal Service et. al.*, 2013 WL 5818889. (the “Federal District Court Case”).

³ See Federal District Court case. *Id.*

⁴ See Order for Preliminary Injunction, Document No. 52, Federal District Court Case.

National Environmental Policy Act (“NEPA”) regarding the proposed multiple use project that Cappelli proposed for the Historic Stamford Post Office site and land adjacent to the historic post office. The Federal Court judge stayed any court decision regarding compliance with the NEPA (Count I of the Complaint) and the National Historic Preservation Act (“NHPA”) (Count II of the Complaint) until the USPS completed an environmental assessment (“EA”) or full Environmental Impact Statement (“EIS”) and filed its findings from that report with the Court. The USPS filed its EA on March 18, 2014 with the Federal Court and the Defendants also claimed they had complied with the NHPA. The Court next held a hearing on the Motion to Dismiss Counts III and IV of the Complaint in May, 2014. After the hearing on the Motion to Dismiss, the Federal Court held that Counts three and four of the complaint be dismissed. Count III (Public Trust) was dismissed for failing to state a cause of action and Count IV (Discrimination in USPS services) was dismissed because the Court lacked federal jurisdiction to hear the claim since it involved issues for the PRC to decide.⁵ See, *LeMay v. U. S. Postal Service*, 450 F.3d 797, 800 (8th Cir. 2006). The dismissal was based upon the theory that Congress intended to remove consideration of postal service complaints from the courts altogether.

⁵ See, Order regarding Motion to Dismiss of Defendants of Counts III and IV. Federal District Court Case.

Because of a conflict of interest between the two Plaintiffs' in the Federal Case, each Plaintiff sought their own counsel in December, 2013. The Art Center and the Collaborate both moved to amend the Complaint after obtaining new and separate legal counsel. The Art Center asked the Court to allow an amendment to the Complaint so that the Art Center could add a breach of contract claim.⁶ The Court ruled that the Art Center could not amend the Complaint because although the Motion to Amend was timely, the Art Center did not have "good cause" to justify the amendment⁷. Such ruling was on a procedural, not substantive law basis.⁸ Res Judicata only applies to a claim that has been resolved after full trial on the merits involving the same parties. The decision of the Federal Court on the Breach of Contract claim was not after full consideration of the claim and on the merits. See, *Higgins v. NMI Enters., Inc.* (E. D. La. 2012) at page 19. The claim is also not subject to claim preclusion for the same reason as there was never decision of the Federal Court on the merits of this claim. See, *Kiska Const. Corp.- U. S. v Wash. Metro Area Transit Authority* 736 F. Supp 171 (D. D. C. 2010).

⁶ Motion to Amend Complaint of the Art Center. Federal District Court Case.

⁷ See Order on Motion to Amend of the Art Center. Federal District Court Case.

⁸ The Federal Court ruled that the Scheduling Order in the case allowed the Plaintiffs to file Motions to Amend the Complaint by April 24, 2014, but did not state that the Federal Court would necessary grant such motions. The Federal Court denied that Motion to Amend of the Art Center to add the breach of contract claim. There was no ruling on the merits of the Conflict of Interest, Breach of Contract, and Real Estate Handbook Claims in this Complaint by the Federal Court. Count I in this Complaint, the discrimination claim, was not heard by the Federal Court, but dismissed for lack of jurisdiction. The Historic Stamford Post Office closing claim was dismissed voluntarily by the Art Center and the other plaintiff in the Federal Court Case because the PRC has exclusive jurisdiction over post office closing or consolidation issues under 39 U.S.C. § 404 (d) of the postal service statutes.

(“For claim preclusion to apply the prior action must have decided the issue on the merits and be contested by the parties”).

Over the summer of 2014, the parties to the Federal Case filed agreed to a schedule to file cross motions for summary judgment on counts I and II of the Federal complaint and to file briefs regarding the NEPA and NHPA counts in the case and the Federal Court established a schedule for oral argument to rule on the issues of NEPA and the NHPA. The Federal Court ruled on November 28, 2014 that the Defendants had complied with the NEPA and the NHPA after full briefing of the issues and oral argument in preparing an EA and that a further EIS need not be prepared because of the finding in the Defendants’ EA that there was no significant environmental impact to the proposed Cappelli multi use project.⁹ Neither Plaintiffs to the Federal Case appealed the final decision on summary judgment regarding the environmental impact of the proposed Cappelli development. The Federal Case holding on the environmental and historic preservation issues did not resolve any issues subject to this Complaint. The Federal Court did hold that it had no jurisdiction over the Discrimination Count under 38 U.S.C. § 403(c) which was the exclusive jurisdiction of the PRC¹⁰ and one other holding. The other holding of the Federal Court was that in conducting

⁹ See Order on Summary Judgment Cross Motions. Federal District Court Case.

¹⁰ See, Order on Motion to Dismiss of the Defendants.

a proposed sale of the Historic Stamford Post Office, the USPS finally, after court intervention, had complied with both the NEPA environmental law and the NHPA historic preservation law with respect to the proposed sale of the Historic Stamford Post Office to Cappelli as of the date of the Federal Courts decision in November, 2014. The Federal Court did not hold anything with respect to the breach of contract or other claims of the Art Center against the USPS nor with respect to the Historic Stamford Post Office closing on September 20, 2013.

II. THE PRC HAS BROAD JURISDICTION TO REVIEW USPS ACTIONS THAT VIOLATE THE REQUIREMENTS OF 39 U.S.C. § 3662(a) AND TO REVIEW ANY ACTIONS OF THE USPS RELATING TO THE INVESTIGATION OF CIVIL MATTERS RELATING TO THE POSTAL SERVICE UNDER 39 U.S.C. § 404(a) AND HAS THE JURIDICION TO INVESTIGATE CONFLICT OF INTERESTS OF POSTAL EMPLOYEES.

The PRC clearly has jurisdiction to review any claim of discrimination under 39 U.S.C. § 403(c), because that provision is specifically mentioned in 39 U.S.C. § 3662(a) as subject to review by the PRC. The PRC also has the power “to investigate...civil matters relating to the Postal Service.” 39 U.S.C. § 404(a), which is another enumerated statute that is subject to PRC review under 39 U.S.C. § 3662(a).

The PRC also has the power to enforce all provisions of title 18 dealing with the postal service or officers or employees of the U. S. Government. 39 U.S.C. §

410(b) (2) and Chapter 73 with respect to the conduct of postal service employees. These statutes are the jurisdictional basis for the PRC review of the Art Center's Discrimination in services, Conflict of Interest, Breach of Contract and Real Estate Handbook claims under the Complaint.

III. STANDARD OF REVIEW OF MOTION TO DISMISS

The Federal Court Motion to Dismiss standard of review required the Plaintiffs in that Federal Case to raise sufficient factual matters, accepted in the light most favorable to the Plaintiffs, that "state a claim that is plausible on its face". *Ashcraft v. Iqbal*, 556 U. S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Detailed allegations are not required but a claim will be found facially plausible only if "the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged" *Id.* Factual allegations must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U. S. at 555 (alterations in original).

The PRC applies a less stringent "colorable claim" standard in assessing whether or not to grant a defendant's Motion to Dismiss with respect to a count of the Complaint. See Complaint of Capital One Services, Inc., Docket No. C2008-3, PRC Order No. 92 at 4, PRC Order No. 1307 at 9. To withstand the Motion to Dismiss on each count of this Complaint the Plaintiffs need only raise colorable material issues of fact and law to defeat the motion. 39 U.S.C. § 3662(b).

In this case each of the five counts within the Complaint of the Complainants to the PRC raises colorable and material fact and legal issues sufficient to withstand the Motion to Dismiss filed by the USPS.

IV. Violation of 39 U. S. C. 403(c) Discrimination in Providing Services Raises Material Facts and a Legal Issue that Withstand the Motion for Dismiss of the USPS.

The PRC has jurisdiction to review discrimination by the USPS in its handling of the bidding process for sale of the Historic Stamford Post Office under 39 U.S.C. § 403(c) during 2012 and 2013. That statute prohibits the USPS from “mak[ing] any undue or unreasonable discrimination among users of the mail” or to grant any “undue or unreasonable preference” to a user of the mail when providing “services” **or** in establishing classifications, rates and fees.” See, 39 U.S. C. § 403(c). (emphasis added). The USPS argues several things in an attempt to have this claim dismissed. It argues that the PRC can only has to review jurisdiction of Complaints about postal services, including classifications, rates and fees, but no other USPS service complaints. It also argues that the Federal Court held that the statute only applies to postal service issues involving postal classifications, rates and fees, but in fact any discussion of this issue is dicta and not the holding of the final Federal District Court case. The statute applies to the establishment of classifications, rates and fees, but it also applies to other services of the USPS if the first clause of the statute is to be given any meaning. The USPS provides passport and other services such as stamp collector services, sale of gift cards and postal mailing supplies and an elderly customer “Alert System” to check on the well-being of elderly customers that are not related to postal classifications, rates and fees. The statute also applies to services necessary to carrying out the postal services that the USPS was establish to provide.

Leasing or purchasing or selling the buildings in which the USPS provides postal services is also subject to this nondiscrimination rule. For instance, if the USPS enacted a rule to provide access to its postal buildings only to white customers and not minority group customers, based

upon a belief that the USPS system facilities would then be safer because minorities commit most of the crimes in society, the PRC would not claim it had no jurisdiction to resolve such discrimination in providing services by discriminatory access to the USPS postal facilities because it did not involve “establishing classifications, rates and fees relating to postal services. The prohibition of an undue preference or unreasonable discrimination of users of the mail is not limited to the context of their use of the mails in the statute or the cost of use of the mails. To narrow the interpretation of the statute to uses of the mails with respect to their use of postal services makes the first clause of the statute describing services in general as meaningless and of no effect. Courts and administrative agencies must give statutes their common meaning to give all language in a statute a common sense meaning. This statute is more general than to limit its reach to only “classifications, rates and fees”. To read it otherwise would give no meaning to the first clause of the statute which talks about a nondiscrimination rule applicable to all services of the USPS, not just “classification rate and fee issues with respect to postal services.

In the case of the Complaint of Capital One Services, Inc., service complaint raised in Docket No. C2008-3 (“Capital One”), the PRC ruled that the USPS’s Motion to Dismiss be denied in Order No. 92 because of the refusal of the USPS to allow Capital One Services, Inc. a negotiated services agreement for bulk mailing that it allowed Bank of American to sign and utilize. The present case is no different than the Capital One case although it applies to postal services more generally in this case and not to a negotiated service agreement contract with the postal service as in the Capital One case. In both cases the USPS refused to allow one user of the mail to utilize a set of contract terms it freely granted to another user of the mails, so as to discriminate against one user of the mail (Art Center) and cause an undue and unreasonable preference to another user of the mails (Cappelli entity). The Motion to Dismiss of the USPS in

this case must be denied on the same basis as the denial of that motion on the Capital One Services, Inc. Complaint.

Services in 39 U.S.C. § 403(c) is not limited to postal services involving the “establishment of classifications, rates and fees”. Services includes owning or leasing real estate to insure that the mail services can be performed. In that regard the USPS has an entire real estate department that does nothing but buy, lease, sell and maintain the thousands of buildings owned or leased by the USPS to allow delivery of the mail. In addition, its exclusive real estate agent has for several years now (CBRE) maintained a web site devoted to the sale of surplus real estate of the USPS, much like the General Services Administration. The anti-discrimination statute is thus much broader than the reading given to it by the USPS. The PRC has jurisdiction to hear this Complaint that the USPS created an “undue preference” for Cappelli and an “undue disadvantage” to the Art Center in its service relating to the to the ownership or sale of its surplus real estate used to provide postal services. It did so by refusing to deal with the Art Center on terms of a purchase contract that it freely negotiated to Cappelli.¹¹

**V. THE ART CENTER HAS RAISED MATERIAL ISSUES OF FACT
AND A COLORABLE LEGAL ISSUE WITH RESPECT TO THE
CONFLICT OF INTEREST CLAIM**

¹¹ In the Affidavit of Jim Fagan in the Federal District Court case, this advantage to Cappelli was allegedly based upon its superior financial condition. That position described by Fagan is challenged by the Art Center. During the recession, the Cappelli entities suffered loses and calamities that almost every other regional real estate firm suffered from. For instance, an affiliate of the Cappelli entity is the subject of collection actions over a judgment in excess of \$1 million dollars, even though that defendant may still be contesting the liability. In addition, there were reports in the media in 2009 and 2010 that the Cappelli enterprises were in difficult financial condition and may be filing bankruptcy.

It is also curious that in closing upon the purchase of the property in early December, 2014 the Cappelli entity had three different mortgages on the property for borrowed funds.

The PRC can entertain a Complaint by an interested person under 39 U.S.C. § 401(2) with regard to a conflict of interest relating to a financial interest contrary to the interest of the postal service. Section 401(2) states that the USPS may “adopt, amend or repeal such rules and regulations not inconsistent with this title [Title 39] and such other functions as may be assigned to the postal service under any provision of law outside this title.” *Id.*

The PRC has the power “to investigate...civil matters relating to the Postal Service.” 39 U.S.C. § 404(a). It also has the power to enforce all provisions of title 18 dealing with the postal service or officers or employees of the U. S. Government. 39 U.S.C. § 410(b) (2) and Chapter 73 with respect to the conduct of postal service employees.

Title 5 and Title 18 provisions and certain USPS regulations deal with conflicts of interest generated by employees of the USPS. An employee of the USPS may not promote a “financial interest” that is adverse to the USPS without full disclosure of the conflict of interest with a review by the General Counsel of the USPS to determine if the financial interest disqualifies the employee from participating on a bid, project, or activity within the USPS which will have an outcome effected by that conflict of interest. In the case of the proposed sale of the Historic Stamford Post Office, David Rouse was a contract employee of the USPS that was the main negotiator for the entire Art

Center negotiation and on information and a portion of the Cappelli bid and negotiation to purchase that property. We know from public records that sometime on November, 2012, Mr. Rouse went to work for CBRE, the commercial real estate company that entered into an exclusive contract to manage the sale of excess postal properties, in June, 2011. Sometime in 2014 it appears that Mr. Rouse revolved back through the door to become employed once more by the USPS in its Washington, D. C. headquarters.¹²

Federal law outside of Title 39 that applies to the USPS is the federal law on government employee conflicts of interest, including financial conflicts of interest. Under 18 U.S.C. § 208(a) prohibits any “officer or employee” of any executive branch of the United States Government, or any independent agency of the United States ... through any decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, in a judicial or other proceeding, application, request for a ruling or other determination, **contract**, claim or controversy, charge, acquisition, arrest, or other particular matter in which, to his knowledge, he ..., organization in which he is serving as...**[an] employee, or any other person or organization with whom he is negotiating or has any arrangement concerning prospective**

¹² See declaration of Debra Sherwood regarding the LinkedIn profile of Mr. David Rouse. Sherwood Declaration at paragraph 6.

employment, has a financial interest. *Id.* In this case, David Rouse had a prospective employment financial interest with CBRE because of his prospective employment by CBRE which turned into actual employment in November, 2012.

In the case of *Express One International, Inc. v. USPS et. al.*, 814 F. Supp. 87 (D.D.C. 1992) a federal district court judge held a ten year \$ 1 Billion dollar postal air mail delivery contract void because an employee rating and selecting the winning bidder for the contract was at the same time negotiating an employment agreement with the winning bidder and accepted the job after the contract was awarded. In *Express One*, the legal department of the USPS was aware of the conflict, and had the general counsel's office review the conflict of interest. The general counsel's office review concluded that a conflict of interest existed and that the employee should be reassigned from the assignment. Nonetheless, the supervisor of the employee felt the employee was too valuable to the process and did not reassign the employee. *Id. at 90*. The USPS argues that the sale contract to Cappelli cannot be voided by the PRC. If a federal judge can rescind a \$1 billion dollar air carrier contract of the USPS for a conflict of interest, the PRC can certainly rescind a \$4.3 million dollar real estate contract for the same reasons.

The Plaintiff have raised colorable facts to preclude granting of a Motion to Dismiss on this conflict of interest claim, showing that the PRC has jurisdiction to investigate this claim and that there are facts that support a claim of conflict of interest that will be fleshed out through discovery in this case. In this case we know that Jim Fagan sent an e-mail to Jeff Dunne on September 14, 2012 requesting if Mr. Cappelli would be interested in the bid suggested by Jim Fagan. It appears highly likely that CBRE represented Cappelli as commercial real estate agents in the transaction. David Rouse clearly went to work for CBRE in November, 2012 and negotiated both purchase contract bids. Rouse now appears to works at the corporate office of the USPS. See Declaration of Debra Sherwood. So Mr. Rouse was working for the real estate agent of Cappelli after negotiating his employment with CBRE after working on the negotiations with both the Art Center and Cappelli and this was never disclosed to the parties and Rouse was never taken off that assignment. Given the circumstances of the bid process and this undisclosed conflict of interest, the PRC must allow discovery on this issue and or order an investigation of it.

**VI. THE ART CENTER HAS RAISED MATERIAL FACTUAL AND
LEGAL ISSUES REGARDING BREACH OF CONTRACT SUFFICIENT
TO AVOID A MOTION TO DISMISS OF THIS CLAIM.**

The elements of a breach of contract claim are formation of the material terms of the contract, breach of the contract by one party and damages to the nonbreaching party. It is undisputed that both the Art Center and the USPS signed the final contract and lease agreement between the Art Center and the USPS in September, 2012.¹³ The contract included the material terms of contract price, the legal description of the land to be purchased and the building upon the land, the closing date and the conditions to closing and penalties for not closing of each party. The Art Center was damages upon breach of the contract when the Cappelli purchase agreement was signed in December, 2012 as it had spent a great deal of legal costs and due diligence costs relating to its purchase contract.

The USPS alleges that there was no purchase contract to breach because the Art Center did not place its down payment in the escrow account and because the Art Center did not negotiate a provision in the purchase contract to allow it to demand specific performance in the case of a breach of the real estate contract by the USPS.

Under applicable case law that is enforceable against the USPS, the courts have held that in certain circumstances in which the USPS or its agents have misrepresented material term relating to the formation of a contract, the Courts will estop the USPS from denying the contract or even estop it from asserting certain

¹³ See Federal District Court Case, Discovery Documents.

affirmative defenses to avoid rewarding inequitable and conduct in bad faith and to shape an equitable remedy for the party not in breach of the contract. See, *Portman v. U. S.* 674 F 2d 1155 (7th Cir. 1982); *Azar v. USPS* 777 F 2d. 1265 (7th Cir. 1985); *Gildor v. USPS* 376 F. Supp. 2d 284 (N. D. N. Y. 2005). The Art Center's breach of contract claim is based upon the material misrepresentation of the Cushman and Wakefield realtors that the Art Center could not have an 18 month period between the purchase contract signing and closing because the USPS had "prospective buyers that would pay cash and closing in sixty days". See, Affidavit of Debra Sherwood at page 1-2. What the Art Center discovered in the Federal Court Case was that not one bidder in the auction style sale process conducted in early 2012 was paying cash or offering to close in sixty to eighty five days. In addition, the Art Center was told that the USPS draft purchase agreement could not be altered in any material respect or it would be rejected by the USPS, yet it allowed the Cappelli entity to negotiate all of the changes listed below, yet denied to the Art Center in its negotiation of a purchase agreement with the USPS. The Art Center relied to its detriment on these material misrepresentations and altered its negotiations for the purchase based on the misrepresentations. It has incurred legal and due diligence expenses it would not have otherwise incurred but for the misrepresentations and conflict of interest of the USPS. The PRC should

deny the Motion to Dismiss because the Art Center has raised material issues of fact and law on this breach of contract claim.

Here is the list of provisions negotiated with Cappelli but denied to the Art Center in its signed contract:

| <u>Clause</u> | <u>Cappelli</u> | <u>Art Center</u> |
|------------------------|---|-----------------------|
| Down Payment | \$400,000 amended down to \$100,000 | \$500,000 |
| Specific Performance | Allowed | Not allowed |
| Right of first refusal | | |
| If USPS defaults | Three year right to buy and enforce by Specific performance | No right |
| Title defects | May assert and require USPS to correct. | Waived after 15 days. |
| Lease back of space | None, but amended into the deal at the last minute to provide USPS | |

| | | |
|--------------------|--|-------------------------|
| | lease back for up to 30 month. | Seven month lease back. |
| Liquidated Damages | Only \$100,000 if Cappelli does not close | Up to \$750,000. |

The Art Center has alleged and shown sufficient material issues of fact and law to avoid a Motion Dismiss on this Count.

**VII. THE USPS HAS VIOLATED ITS OWN REAL ESTATE
HANDBOOK PROVISION THAT REQUIRES IT TO OBTAIN
THE BEST VALUE FOR ITS SALE OF SURPLUS POST OFFICE
REAL ESTATE.**

The post office Real Estate Handbook requires the USPS to obtain the best value in selling its real estate. Common sense and the definition of best value means the highest price. “Best value” is defined as the most advantageous marketable price. See, Webster’s Collegiate Dictionary, 1941. (Combined definition of best and value). The Art Center is willing and ready to pay \$5.0 million for the property that Cappelli only paid \$4.3 million to purchase. As stated previously under the discussion of the Conflict of Interest Claim, the PRC can review any civil matter

involving the USPS or any violation of a rule or regulation adopted, amended or repealed by the USPS. In this case, the PRC is entitled to review the USPS's compliance with the terms of its Real Estate Handbook to realize the best value when selling its surplus property.

The Art Center has raised material issues of fact and law to avoid application of a Motion to Dismiss to this Court alleging violation of the USPS Real Estate Handbook by failing to obtain the best and highest value in the sale of the Historic Stamford Post Office.

VIII. THE HISTORIC STAMFORD POST OFFICE WAS CLOSED IN VIOLATION OF 39 U.S.C. § 404(d) APPLICABLE TO THE USPS AND THE PLAINTIFFS HAVE RAISED COLORABLE ISSUES OF MATERIAL FACT AND LAW WITH RESPECT TO WHETHER THE CLOSURE WAS A RELOCATION OR CLOSURE UNDER POSTAL SERVICE STATUTES AND REGULATIONS.

The Art Center and a postal service customer of the Historic Stamford Post Office filed an Appeal with the PRC in October, 2013 to dispute the precipitous closing of that post office as a closure without advance notice and a public hearing provided to the postal service customers like Mr. Hazel as required of the USPS.¹⁴ The Collaborate intervened in the proceeding and filed a Brief in support of the Appeal. In addition, the Public Advocate supported the position of the Appellants in the matter, asserting that the closing was not a relocation of that post office but a de facto closure of the mail facility. The PRC dismissed the matter without prejudice in January, 2014, as premature, but also ordered the USPS to report back to it about the status of opening a

¹⁴ See, PRC Docket No. A-2014-1.

replacement Stamford, Connecticut downtown post office. In February, 2014 the USPS filed a report with the PRC that it had “thirteen or more conference calls with respect to a replacement downtown post office in Stamford, Connecticut, and that it was down to two potential landlords for a new post office site.” No other report was filed by the USPS with the PRC on opening a replacement Stamford, Connecticut downtown post office in Docket No. A2014-1, from March, 2014 until the Motion to Dismiss was filed in this case which disclosed that a lease for a new post office was signed on August 29, 2014 for a facility at 500 Summer Street in Stamford, Connecticut. The issue of the closure without a replacement post office is not moot because the new facility has not been opened.

The Complainants believe that the facts of this facility change show that the USPS closed the Historic Stamford Post Office without making any plans to open a new location at the time of the closure of the old location which was really closed without any emergency at all. Compare this to what the USPS did when it was working with the Art Center as the high bidder for purchase of the Historic Stamford Post office in the summer of 2012. In signing the purchase contract with the Art Center, the USPS at the same time worked to negotiate a lease for a new location for the Stamford post office contingent upon selling the Historic Stamford Post Office. Why was this done with the Art Center purchase contract and not the Cappelli bid? The Plaintiffs believe it was because the USPS had no intent to open a replacement downtown post office, because of its entry into a contract with Staples to provide retail service locations in Staples stores on an experimental basis in 2013, which is now being expanded to all 1800 or so Staples stores, or because of other economic reasons. What follows are the facts regarding the proposed so called “relocation” of the Historic Stamford Post Office by the USPS, including the attempt of the USPS to characterize its actions to close the Historic Stamford Post Office as an “after the fact”

“emergency suspension” to close the facility on an emergency basis without having obtained a lease for a replacement post office.

- The USPS held public hearings on August, 2010 that the facility would be relocated, then the USPS listed the property for sale with Cushman and Wakefield in Stamford. The notice of the public hearing was not well publicized.
- After the Art Center refused to post the down payment on its signed purchase agreement in September 2012 (and was then told by Jim Fagan that the post office would probably take the property off the market for a time) because of what it believed was the misconduct of the USPS and its real estate agents, the USPS negotiated and signed a sale contract for the Historic Stamford Post Office with the Cappelli entity in December, 2012. That contract gave the USPS up to 20 months to find a new location for the estimated 3,500 square feet it would need for a new facility in the downtown Stamford area (based upon discussions of the new facility negotiations with a landlord during the Art Center purchase contract negotiations as for the 3,500 feet issue), with an alleged build out cost of \$1 million dollars to the USPS. That, by the way, is an alleged build out cost per square foot of \$285.72 per square foot of the new leased space, which is an astronomically high build out cost for any such commercial facility.
- What did the USPS do to find a relocated Stamford downtown post office between December 2012 and the date of the proposed sale of that property to Cappelli in September, 2013? It is believed the answer to that question is not much.¹⁵ The USPS also had no plans to lease back space in the existing building between signing the Cappelli purchase agreement in December, 2012 until about a week before the proposed closing

date for the Cappelli transaction that was proposed to close on the morning of September 25, 2013,¹⁶ which was halted by the temporary injunction prohibiting that sale. In the week before the proposed closing date, Cappelli and the USPS signed an amendment to the Cappelli purchase agreement that allowed the USPS to lease back a portion of the Historic Stamford Post Office for a prepaid rent of \$300,000 for 30 months, reducing the purchase price for the Historic Stamford Post Office to a net of \$4.0 million dollars for the land and buildings. At the same time the USPS reduced the down payment required of Cappelli from \$400,000 to \$100,000. The USPS has misstated the facts in its Motion to Dismiss as though the Cappelli entity was given a down payment of \$100,000 because of its superior financial condition. This is far from accurate. The original down payment of the Cappelli entity to be placed in escrow was \$400,000, but even with that down payment, the amount on deposit with the escrow agent was placed in the escrow account and then was release to Cappelli from time to time such that the account balance was zero for a time. It is highly unusual to have an escrow fund that the buyer can remove and use during the escrow period, but that is what happened in this case.

- The USPS did not relocate the Historic Stamford Post Office. The facts of what happened make this a closure under the postal service statute and rules. The USPS closed the post office and at the last minute in the life of the Cappelli purchase contract, anticipated leasing back part of the building from Cappelli. Yet during the Federal Case the USPS stated it would not lease back space from Cappelli, having shifted its position from a closure of the facility which it posted on the building on September 18, 2013¹⁷ and described to its customers, instead now characterizing the closure as an emergency

suspension because of the condition of the building with new notices posted on the post office on October 18, 2013¹⁸. The lease back had to be abandoned because the USPS recharacterized the closing as an “emergency suspension”. It is curious that one week before the scheduled closing of the Cappelli purchase the USPS had no issue with leasing back the facility, but one week after that proposed date the facility is so bad the USPS reverts to a position that the building is hazardous and no one can work in it.

- The USPS admitted that in the first notice it posted to its customers of the closing:

“At this time we have not yet found a permanent new location. But we will continue to explore all of our alternatives to find a new permanent location to provide you with full postal services within the immediate future” (emphasis added). Participant Brief in Opposition to Motion to Dismiss, Exhibit A. Docket No. A2014-1.

The USPS argues that this statement says it was vacating the building, but not closing it. Let’s look at the facts of the closure to determine what it was that the USPS did on September 20, 2013, and decide factually if it is, based on the facts a closure under applicable post office statutes or a relocation.

- The building was locked up, there was no alternative full service post office to replace it in downtown Stamford, Connecticut.
- The USPS did not follow its own Handbook rules for a suspension of service. See, Response Brief of the Public Advocate in Opposition to USPS’s Motion to Dismiss (“Public Advocate Response Brief”) page 4, Docket No. A2014-1 (requirement that USPS notify the customers by individual letter of the proposed suspension, including

effective date for the suspension and the reason for it). No letter was sent to postal customers, it was posted as a closure on the building without adequate notice to the customers and that notice disclosed that there was no new location. The USPS closed the facility on two days' notice and posted it on the building. Then about two weeks after the closure the USPS changed course and declared the closing as an "emergency suspension" after the facility was closed and the USPS had been sued in the Federal Case over its handling of the sale process in a discriminatory manner in violation of law, in violation of the NEPA and the NHPA laws and in violation of the closure statute and after an appeal was filed at the PRC to suspend the closure of the Historic Stamford Post Office as a violation of the closure postal statute and regulation. The customers had no notice to comment on the closure action and there was no public hearing about the closure. In other words the USPS admitted that it did not follow its own statute on closing of the Historic Stamford Post Office at the date of closing by revising the notice a month after that closing to characterize the closing as an emergency suspension after the fact. The closure of the Historic Stamford Post Office was a de facto closing of the facility without proper notice and public comment in violation of applicable postal service statutes and regulations. See, 39 U. S. C. Section 404(d) (2) (B) and 39 C.F.R. Section 241.3(a) (5) (ii) (C) (OSHA violations cannot be considered in a closure decision). The reason that violations of OSHA (which would

include leaving the facility on a state of disrepair to the point that it must be closed) are not acceptable reasons for an “emergency suspension” is sensible because to allow such activity allows the USPS to manipulate the closure and consolidation rules as it has in this case by not maintaining the facility properly, declaring a very questionable “emergency suspension” because it has not maintained the building, and then avoiding the opening of any replacement facility at all or delaying the opening of the relocated facility for several years, like it has delayed that opening for over a year and a half in this case by manipulation of its rules and regulations. The PRC should not reward such gamesmanship of the USPS rules and regulations.

- The USPS’s revised notice is still defective because its actions do not fit into the definition of an emergency suspension. Let’s quote the suspension rule so the USPS is not able to dance around the language with a vague argument about its effect, as it has tried to do in its briefing of the Docket No. A2014-1 Appeal of the closure and it continues to argue in its Motion to Dismiss of this Complaint. The USPS’s action in the case of the Historic Stamford Post Office does not meet the definition of an emergency suspension. 39 C.F. R. Section 241.3(a)(5)(i)(B):
“Emergency suspension of the USPS-operated retail facility due to cancellation of a lease or rental agreement when no suitable alternative quarters are available in the community, a fire or natural disaster, irreparable damage when no suitable

alternative quarters are available in the community, challenge to the sanctity of the mail, or similar reasons.”

- The three categories for an emergency suspension are (1) natural disasters, such as fire, flood, tornado that causes irreparable damages; (2) causes beyond the control of the USPS such as loss of a lease from a third party landlord; or (3) loss of security over the mail. Emergency suspension does not include a manufactured emergency suspension caused by the USPS’s own negligent conduct in failing to maintain the interior of the post office to the point that it declares the building unfit for human habitation at some point so it can close it by a manufactured “emergency suspension”. This facility has been in its current state of disrepair for several years without any action by the USPS to declare an emergency suspension, because it was not a basis for an emergency suspension. See, Affidavit of Debra Sherwood, page 2. In other words, the emergency suspension definition in the regulations does not include actions or inactions within the control of the USPS. As stated by the Public Advocate in Docket No. A2014-1, the USPS had many months to find new space from the signing of the Cappelli sales contract in December, 2012 to September, 2013, the date of the proposed Cappelli sale closing that was stopped by the Federal Court injunction. The Cappelli purchase agreement could have closed as late as two years from signing of the Cappelli contract in December, 2012 or as late as December, 2014, although the USPS could be

required to close by Cappelli at any time after September 2013. This means that the USPS had more than 21 months to find a new downtown post office leased location under the Cappelli purchase contract, but it did not search for or find or open a replacement post office during that time, despite a very high vacancy rate for downtown Stamford commercial office space during that time frame.

- Presently the USPS is still completing the interior build out of the new facility selected and there is no definite date that the location will be open for business. The lease of the space was not signed until August, 2014, more than 13 months after the proposed sale of the Historic Stamford Post Office to the Cappelli entity. In contrast, when negotiating with the Art Center, the USPS was negotiating a lease for a new location for the downtown Stamford post office that it planned to open by the time the Art Center closed on the purchase of the post office building. The time span for the USPS to move in the Art Center contract was in seven months from the signing of the purchase contract, which was the maximum amount of time between contract signing and closing that the USPS would allow to the Art Center.

This set of facts raises a factual issue about whether or not the emergency suspension regulation standard was met in the closing of the Historic Stamford Post Office on two days' notice. In addition, there is a fact issue of whether or not the closing is a relocation or a de facto closing because in this case the post office

was closed in September, 2013 with no provision for a relocated site, and even now we do not know when the new location at 500 Summer Street will be opened. It is in the PRC's interest to clarify the boundaries of relocation, closure and consolidation and an emergency suspension so both the USPS and its customers are treated fairly in such situations and the statutes and regulations are fully complied with. The USPS is not entitled to a motion to Dismiss this count because the Plaintiffs have raised factual and legal issues that state a claim that withstands the Motion to Dismiss. The Complainants should be able to conduct discovery on this count of their Complaint.

IX. CONCLUSION.

The PRC has jurisdiction to hear all five claims asserted in the Complaint. The Art Center has met its burden of showing material facts and legal issues relating to each of the discrimination, conflict of interest, breach of contract and Real Estate Handbook claims of the Complaint. None of the claims of the Art Center are subject to dismissal because of either Res Judicata or claim preclusion common law. Both Complainants as to the post office closure issue have met their burden to assert colorable material facts and a legal issue that warrants the denial of the USPS's Motion to Dismiss of that claim and the post office closure issue is not moot because no new downtown post office has been opened yet and even when and if it is opened the issue is not moot because

similar issues involving the interplay between relocation and closure or consolidation of post office locations and the use of the “emergency suspension” rules must be resolved by the PRC to give postal customers and the USPS clear guidance for operating within the confines of the relocation, emergency suspension and closure or consolidation statutes and rules of the postal service.

Respectfully submitted,

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Attorney for the Center for Art and Mindfulness, Inc. and Norton Hazel

DECLARATION OF DEBRA SHERWOOD

Debra Sherwood hereby declares under penalty of perjury under 28 U.S.C. § 1746 that the following is true and correct:

1. My name is Debra Sherwood. I am the Executive Director and a Board member of the Center for Art and Mindfulness, Inc. (the “Art Center”). The Art Center is one of the Complainants in PRC Docket No. C2015-1 filed at the Postal Regulatory Commission on December 29, 2014.

2. During the negotiations for the purchase of the historic Stamford post office on behalf of the Art Center, one of the parameters of the purchase terms was the amount of time sought prior to closing. I asked for an 18 month period from signing to closing to allow time to fund the purchase. During my negotiations, I was told by Brian Scruton in writing and James Fagan, verbally, both of Cushman and Wakefield, that the Art Center would have to propose a purchase contract without contingencies and a short time to close because there were other cash offers that would close in sixty to eighty five days. The realtors for the USPS wanted a short time for due diligence and a non-contingent purchase contract.

3. When discovery documents were produced by the USPS in the Connecticut Federal District Court case (*National Post Office Collaborate and the Center for Art and Mindfulness, Inc. v. United States Postal Services et. al.* Civil Case No. 3:13cv1406 (JBA)), I discovered that none

of the other offers to buy the Stamford post office were cash offers that would close in sixty to eighty five days.

4. Attached hereto as Exhibit A is the letter dated June 7, 2012 received by me as an officer and director of the Art Center from Brian Scruton of Cushman & Wakefield. The letter states it would be “extremely difficult for the Owner to enter into a transaction with a party who did not have cash on hand for a closing that was 60-85 days away.” Attached as Exhibit B is an additional letter received by Drew Backstrand and me dated June 11, 2012 from Brian Scruton of Cushman & Wakefield. The letter states, “We will consider your Offer withdrawn if you are not able to demonstrate by 5:00 PM EDT on Wednesday, June 20th—time being of the essence, that (i) the buying entity has the financial wherewithal to consummate the transaction, and (ii) any due diligence that you might have to complete is definable and within market standards.”

5. In addition, during the discovery in the Federal Case I became aware of an e-mail sent from Jim Fagan of Cushman and Wakefield to Jeff Dunn of CBRE, on September 14, 2012. Jeff Dunn, according to the CBRE web site, represents various Cappelli entities. The Fagan e-mail asked Mr. Dunn if Louis Cappelli would accept an offer to purchase the Stamford Post Office along the terms outlined by Mr. Fagan in that e-mail. I infer from this e-mail that CBRE was involved in the proposed sale of the Stamford post office that resulted in the December, 2012 purchase agreement between the USPS and Cappelli.

6. I have reviewed the LinkedIn website profile for David Rouse, who negotiated the Center for Art and Mindfulness purchase contract for the USPS. Sometime in November, 2012 according to Mr. Rouse’s LinkedIn profile, he went to work for CBRE. Further, his LinkedIn profile states that sometime in April, 2014 he accepted employment with the USPS in Washington, D. C.

7. In June, 2012 I toured the inside of the Stamford post office as part of the Art Center due diligence. The condition of the building included some wet spots in the basement of the building from water leaks. It also included some fallen or missing plaster in some of the offices on the first floor and in the sorting room. Some of the floor on the first floor was damaged in the area right next to the loading dock area. Some paint was peeling off the walls and some of the windows had Plexiglas instead of real glass. Other than these defects, the building seemed adequate to allow employees to work in it in my opinion and it did have postal employees working there at the time.

Dated February 2, 2015.

/s/ Debra Sherwood

Debra Sherwood
Executive Director
Center for Art and Mindfulness, Inc.